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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-803

CONNIE M. HOFFER, ET AL.,

Petitioners,

v.

ANTHONY DeCRESCENZO, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 26 Md. App. 655 and at 338 A.2d 424. The decision of the Court of Appeals of Maryland, denying Petitioner's request for a writ of certiorari to review the Court of Special Appeals

decision, is printed in Appendix A of the Petition for a Writ of Certiorari, filed by Connie M. Hoffer.

JURISDICTION

Petitioner attempts in this case to base the jurisdiction of this Court on 28 U.S.C., Sec. 1257(3). However, for the reasons set out below, there is no jurisdiction in this Court as the question of whether a statute of Maryland applicable to this case is repugnant to the United States Constitution was not properly raised by Petitioner in the Courts of Maryland.

QUESTIONS PRESENTED

Petitioner seeks to raise the following questions:

1. Whether Rule 528L of the Supreme Bench of Baltimore City violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution; and,

2. Whether Rule 528L of the Supreme Bench of Baltimore City violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

STATUTES AND REGULATIONS INVOLVED

In the Petition for a Writ of Certiorari filed on behalf of Connie M. Hoffer the applicable statutes of the State of Maryland are set out.

STATEMENT

Petitioner in January of 1969 filed suit in the Superior Court of Baltimore City (one of the Courts of the Supreme Bench of Baltimore City) against the Respondent for personal injuries Petitioner allegedly sustained as a result of the collapse of a shelf erected by

Respondent. On July 13, 1972, the case having remained on the trial docket for three years without having been tried, the Clerk of the Superior Court of Baltimore City, pursuant to Rule 528L(1) of the Supreme Bench of Baltimore City, sent a notice to all counsel that the case would be dismissed in thirty days unless within that time period an order was signed reinstating the case to the trial docket, pursuant to Rule 528L(3). Such an order was signed within the applicable time limit; however, as of November 13, 1974 this case had not been tried, despite the fact that numerous trial dates had been set in the interim. On November 13, 1974 Respondent filed a motion to dismiss the case on the basis that the case had not been tried within the time period set out in Rule 528L(4) and (6)[1] and the motion was granted. Petitioner then exercised her right of automatic appeal to the Court of Special Appeals of Maryland, which affirmed the lower Court's decision. *Hoffer v. Anthony DeCrescenzo, Inc.*, 26 Md. App. 655, 338 A.2d 424 (1975). Petitioner then sought a writ of certiorari from the Court of Appeals of Maryland, which was denied.

As is admitted in the Petition for a Writ of Certiorari and as is clearly shown by the record in this case, the first time Petitioner raised the question of whether Rule 528L of the Supreme Bench of Baltimore City was repugnant to the United States Constitution was in the petition for writ of certiorari in the Court of Appeals of Maryland. This question was not raised in the Superior Court of Baltimore City, nor in the Court of Special Appeals of Maryland.

[1] Rule 528L(4) and (6) provides that a case must be tried within two terms of court from the term in which it is reinstated to the trial docket, pursuant to Rule 528L(3). In the instant case the order reinstating the case was signed on September 1, 1972 and the next two subsequent terms of Court ended on May 13, 1973.

ARGUMENT

As set out by this Court in the case of *Edelman v. People of State of California,* 344 U.S. 357 (1953):

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. Hulbert v. City of Chicago, 1906, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026; Mutual Life Ins. Co. v. McGrew, 1903, 188 U.S. 291, 308, 23 S. Ct. 375, 378, 47 L. Ed. 480. Noncompliance with such local law can thus be an adequate state ground below." 344 U.S., at 358-9.

It is the position of the Respondent that the Constitutional questions which Petitioner seeks to bring before this Court were not seasonably raised in accordance with the requirements of the law of Maryland and as a result this Court is without power or jurisdiction to decide these questions as they were not properly preserved and there is an adequate state ground for the decision of the Maryland Court of Appeals denying the petition for writ of certiorari filed with it by Connie M. Hoffer.

The laws of Maryland provide a two step appellate review of a decision of the Superior Court of Baltimore City. An automatic right of appeal to the Court of Special Appeals of Maryland is afforded a litigant from an adverse decision of the Superior Court of Baltimore City. Courts and Judicial Proceedings Volume, Annotated Code of Maryland, Section 12-308. A litigant then may appeal to the Court of Appeals of Maryland, but only by petitioning the Court of Appeals for a writ of certiorari, the granting of which lies within the discretion of the Court of Appeals. Courts and Judicial Proceedings Volume, Annotated Code of Maryland,

Section 12-307; Rule 810 of the Maryland Rules of Procedure.[2]

The scope of the questions which can be reviewed by either the Court of Special Appeals of Maryland or the Court of Appeals of Maryland is governed by the Maryland Rules of Procedure.[3] Rule 1085 of the Maryland Rules of Procedure provides as to the Court of Special Appeals of Maryland that:

> "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court. . . ."

The term "lower court" as used in the aforementioned rule means, "the court from which an appeal is taken to this Court." Rule 1000(d) of the Maryland Rules of Procedure. In the instant case the "lower court" is the Superior Court of Baltimore City. Rule 885 of the Maryland Rules of Procedure provides as to the Court of Appeals of Maryland that:

> "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the circuit court. . . ."

The term "circuit court" as used in the aforementioned rule includes the Superior Court of Baltimore City. Rules 5(i) and 800(b) of the Maryland Rules of Procedure.

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[2] Rule 810 METHOD OF SECURING REVIEW — BY WRIT OF CERTIORARI

> The sole method of securing review by this Court is by writ of certiorari.

[3] The Maryland Rules of Procedure are set out in Volume 9B of the Annotated Code of Maryland (1957, 1971 Replacement Volume.)

In the instant case a review of the record clearly indicates that the Constitutional issues which Petitioner seeks to bring before this Court were not raised by Petitioner in the Superior Court of Baltimore City, nor decided by that court. Thus, under the applicable rules set out above, these Constitutional questions could not have been decided by either the Court of Special Appeals of Maryland or the Court of Appeals of Maryland.[4] As a result, these questions were not seasonably raised in accordance with the requirements of Maryland law and this Court is without the power or jurisdiction to decide these questions as there is an adequate state ground for the decision of the Court of Appeals of Maryland denying the petition for writ of certiorari filed by Connie M. Hoffer.[5]

[4] The necessity of raising the federal question in the Superior Court of Baltimore City is emphasized by Rule 23 of the Supreme Court Rules, which requires that a petition for writ of certiorari contain:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the *court of first instance* and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exceptions, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." (Emphasis added.)

[5] It should be noted that Respondent raised in its answer to the petition for writ of certiorari filed by Connie M. Hoffer in the Court of Appeals of Maryland the question of whether Petitioner's Constitutional issues were properly raised and decided in the lower courts of Maryland. A copy of Respondent's answer is printed in the Appendix to this brief.

Based on what has been set out above concerning the jurisdictional question involved in this case, little need be said concerning the substance of Petitioner's Constitutional issues. Rule 528L of the Supreme Bench of Baltimore City is nothing more than an attempt by the Supreme Bench of Baltimore City to keep its dockets clear of stale litigation. It no more violates Petitioner's right to due process under the Fourteenth Amendment than the statute of limitations applicable to claims such as those of the Petitioner. Further, Rule 528L of the Supreme Bench of Baltimore City does not violate Petitioner's right to equal protection. Initially, it should be pointed out that there is no discriminatory classification created by the operation of Rule 528L. Rule 530 of the Maryland Rules of Procedure, (set out in the Appendix to the Petition for a Writ of Certiorari filed in this case) provides a state-wide procedure for dismissing cases that have been pending on the dockets for a specific time period without being tried.[6] Further, even if there is a discriminatory classification it is on the basis of a geographic subdivision (Baltimore City) and such a classification has been upheld. *Salsberg v. Maryland,* 346 U.S. 544 (1954); *Mallet v. North Carolina,* 181 U.S. 1015 (1901); *Chappell Chemical and Fertilizer Co. v. Sulphur Mines Co.,* 172 U.S. 474 (1898); *Missouri v. Lewis,* 101 U.S. 22 (1879).

[6] For an application of Rule 530 of the Maryland Rules of Procedure to facts similar to the instant case see: *Pappalcardo v. Lloyd,* 266 Md. 512, 295 A.2d 221 (1972).

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari filed by Connie M. Hoffer should be denied.

Respectfully submitted,

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(Date)

APPENDIX

In the Court of Appeals of Maryland

September Term 1975
Misc. Docket No. 208
Connie M. Hoffer, et al.,
Petitioner,

v.

Anthony DeCrescenzo, Incorporated,
Respondent.

ANSWER OF ANTHONY DECRESCENZO, INCORPORATED TO THE PETITION FOR WRIT OF CERTIORARI

Petitioners filed suit against the Respondent in the Superior Court of Baltimore City on January 13, 1969 and after service of process was obtained on Respondent this case was placed on the consolidated trial docket on February 16, 1969. This case having remained on the consolidated trial docket for three years without having been tried, on July 13, 1972 the Clerk of the Superior Court of Baltimore City, pursuant to Rule 528L(1) of the Supreme Bench of Baltimore City, sent a notice to all counsel informing them that this case would be dismissed unless a motion to reinstate the case was filed within thirty days. Petitioner filed such a motion within the applicable time limit and the Superior Court of Baltimore City, exercising its discretion, reinstated the case to the consolidated trial docket, pursuant to Rule 528L(3) of the Supreme Bench of Baltimore City. After this case had been reinstated numerous trial dates were set, but as of November 13, 1974 this case had not been tried. On that date Respondent filed a motion to dismiss this case on the basis that the case had not

been tried within the two next subsequent court terms from the term in which it had been reinstated to the consolidated trial docket as Rule 528L(4) and (6) required. Respondents' motion was granted by the Supreme Bench of Baltimore City and this decision was affirmed by the Court of Special Appeals, (No. 930, Sept. Term 1974, decided June 5, 1975), its mandate being issued on July 7, 1975. Petitioners then filed a Petition for a Writ of Certiorari to this Court.

It is important to note that the Petition does not question the correctness of the decisions of the Superior Court of Baltimore City and the Court of Special Appeals that the provisions of Rule 528L (4) and (6) required this case to be dismissed pursuant to the Respondents' motion, but Petitioner claims that Rule 528L is invalid because it is in conflict with Rules 530 and 527 of the Maryland Rules of Procedure and it violates Petitioners' rights of equal protection and due process.

This Court should not issue a writ of certiorari in this case as the issues set out in the Petition are beyond the scope of this Court's appellate review as set out in Rule 885 of the Maryland Rules of Procedure. Rule 885 provides that this Court "will not ordinarily decide any points or questions which do not plainly appear by the record to have been tried and decided by the lower court." From a review of the record in this case it is clear that Petitioner neither in the Superior Court of Baltimore City nor in the Court of Special Appeals raised the questions as to whether Rule 528L is invalid because it is inconsistent with Maryland Rules 530 and 527 and it violates Petitioners' rights of equal protection and due process. Thus, the record does not plainly indicate that these questions were decided by the lower court and by the provisions of Rule 885 cannot be raised in this Court.

Further, the issues raised in the Petition are without sufficient merit to warrant this Court granting a writ of certiorari.

Petitioners first raise the point that Rule 528L of the Supreme Bench of Baltimore City is invalid because it is in conflict with Rule 530 of the Maryland Rules of Procedure. Quite to the contrary Rule 528L of the Supreme Bench of Baltimore City and Rule 530 of the Maryland Rules of Procedure are consistent and are both aimed at removing stale litigation from the court dockets. Under the provisions of Rule 528L of the Supreme Bench of Baltimore City any case which remains on the Supreme Bench consolidated trial docket for a three year period (it should be noted that the three year period is applicable to this case although the rule has been amended to substitute a two year period) without being tried is to be dismissed after notice is sent to all counsel. However, within a thirty day period after notice is sent that the case is going to be dismissed the various courts of the Supreme Bench of Baltimore City in their discretion can reinstate the case to the consolidated trial docket. If the case is reinstated the provisions of Rule 528L (4) and (6) require that it be tried within the next two subsequent court terms from the term in which it is reinstated and if not the case is to be dismissed (in the instant case the order reinstating case was signed on September 1, 1972 and the next two subsequent court terms would end on May 13, 1973). Rule 530 provides that any pending action in which no proceeding of record has taken place within a period of eighteen months shall be subject to dismissal (in the instant case the docket entries reflect that no proceeding of record transpired for an eighteen month period prior to the notice of contemplated dismissal being sent). Rule 530(b) also provides that notice of contemplated dismissal be sent to all counsel and that the case be dismissed unless within thirty days the court signs an order, pursuant to Rule 530(c), suspending the operation of the rule. Rule 530(c) provides that the order suspending the operation of the rule "shall prescribe the duration and any other terms of the suspension."

Comparing the two Rules it is clear that both provide that if a case remains inactive for a specific period of time it is to be dismissed unless an order is signed

suspending the operation of the Rules. If an order is signed reinstating the case then Rule 530(c) provides that the trial court can *prescribe the duration of the suspension,* leaving the lower court to set the exact duration of the suspension. All that the provisions of Rule 528L (4) and (6) do is to prescribe the duration of the suspension of Rule 528L of the Supreme Bench of Baltimore City. Thus, there is no conflict between Rule 528L of the Supreme Bench of Baltimore City and Rule 530 of the Maryland Rules of Procedure.

Further, it is clear that Rule 530(c) contemplates automatic dismissal of the case when one of the conditions set out in the order reinstating the case is that it be tried within a certain period, and it is not tried within that period. This is clearly the holding in *Pappalardo v. Lloyd,* 266 Md. 512, 295 A.2d 221 (1972). In this case notice of dismissal under Rule 530 was sent to counsel on April 26, 1971 and on May 25, 1971 an order was signed suspending the operation or Rule 530. The order reinstating the case further provided, "that the operation of Rule 530 will be enforced unless this case is set for trial on or before January 1, 1972." 266 Md., at 514. The case not having been tried by January 1, 1972, the defendants moved that the case be dismissed pursuant to Rule 530 and the motion was granted. In affirming the lower court's decision this Court stated:

> This case was ripe for dismissal and the notice required by the Rule was given April 26, 1971. The Order which suspended the operation of the Rule set forth that the suspension was conditioned upon a specific act to be performed by plaintiffs' counsel. When they failed to comply within the time allowed, the case was in effect dismissed upon the expiration of the time fixed in the Order. The formal Order of Dismissal entered by the court on January 7, 1972 required no further notice and simply reduced to writing what was an accomplished fact. The action of the lower court, therefore, will be affirmed. 266 Md., at 514-5.

Further, in the case of *Chase v. Ja* *nison*, 21 Md. App. 606, 320 A.2d 580 (1974) the Court of Special Appeals found no conflict between Rule 530 of the Maryland Rules of Procedure and Rule 528L of the Supreme Bench of Baltimore City on almost an identical factual pattern as is involved in the instant case.

The Petitioner also alleges that there is a conflict between Rule 527 of the Maryland Rules of Procedure and Rule 528L of the Supreme Bench of Baltimore City. It should be pointed out that Rule 527 of the Maryland Rules of Procedure deals with postponements and continuances and not with dismissals for lack of prosecution. Further, Rule 527 of the Maryland Rules of Procedure does not mandate postponements and in promulgating Rule 528L the Supreme Bench of Baltimore City has decided not to grant postponements under the circumstances which would require automatic dismissal under Rule 528L(4) and (6) of the Supreme Bench of Baltimore City. To hold that under Rule 527 of the Maryland Rules a case can be set for trial after it should be dismissed for lack of prosecution would be directly contrary to this Court's holding in *Pappalardo v. Lloyd, supra,* where this Court stated that when plaintiffs failed to comply with Rule 530 of the Maryland Rules the case was automatically dismissed.

Finally, Petitioner argues that Rule 528L is invalid because it violates her rights to equal protection and due process. In order to make out a claim that Rule 528L violates the equal protection sections of either the State or Federal Constitutions the Petitioner must show that the Rule creates a discriminatory classification. However, Rule 528L of the Supreme Bench of Baltimore City does not have this effect. As has been pointed out, once a case comes within the purview of Rule 528L it must be tried within two terms of the term in which it is reinstated. Rule 530 of the Maryland Rules of Procedure also provides for dismissal within a time limit after the operation of the Rule is suspended. Thus, in all jurisdictions in the State plaintiffs are treated the same. Further, even if Rule 528L does create a discriminatory classification it is on the basis of a geographic

subdivision and such classifications have been upheld. *Salsberg v. Maryland,* 346 U.S. 544 (1954); *Mallett v. North Carolina,* 181 U.S. 1015 (1901); *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.,* 172 U.S. 474 (1898); *Missouri v. Lewis,* 101 U.S. 22 (1879). Further, Rule 528L no more deprives Petitioner of due process than the statute of limitations.

WHEREFORE, Respondent prays this Court to deny the Petition for Writ of Certiorari.

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I HEREBY CERTIFY that on this 24th day of July, 1975 a copy of the foregoing Answer of Anthony DeCrescenzo, Incorporated to the Petition for Writ of Certiorari was mailed, postage pre-paid, to Herbert J. Arnold, Esquire, and Richard R. Beauchemin, Esquire, Arnold, Beauchemin & Huber, P.A., 807 W. R. Grace Building, Baltimore, Maryland 21202, attorneys for Petitioner.

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